# STATE MONOPOLIES OF INTER-STATE COMMERCE.

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THE commerce clause of the Federal Constitution presents the remarkable instance of a national power which was comparatively unimportant for ninety years, and which, in the last twenty-five years, has so developed that it is now in its nationalizing tendency the most important and conspicuous power possessed by the Federal Government. The recent decision of the United States Supreme Court in the Northern Securities case marks the latest, and perhaps the longest, step yet taken in this rapid progress.

The Constitution gives to Congress power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Federal authority on this subject is compassed in these words. There is naught else save what may be found by implication.

Congress has also jurisdiction over a number of subjects of a kindred nature, such as the power to coin money; to establish uniform laws of bankruptcy; to establish post-offices and post-roads; to regulate weights and measures; to grant patents and copyrights. All these powers, in the early days of the Government, the States shared, in a greater or less degree, with the United States. In Maryland, for example, the Federal currency was established by the Act of December 21st, 1812, "recognizing the coin of the United States." In Massachusetts, this was done by the Act of February 25th, 1795, "introducing the dollar and its parts"; and other statutes of this sort may be found.[1] Patents were granted by a number of States.[2] That the copyright

[1] New York, Act of January 27th, 1797; North Carolina, Act of 1809, Ch. 17.

[2] New York, Act of Feb. 26th, 1789; Vermont, Act of Oct. 19th, 1801; Massachusetts, Act of June 15th, 1793; Maryland, Act of Jan. 22d, 1785.

granted by New Hampshire in the Act of November 7th, 1783, was considered in force after the adoption of the Constitution, is indicated by the fact that the statute is included in the "Laws of 1815,"[1] a book "published by authority" and containing "all the general and public statutes now in force."

It may well be assumed, therefore, that, at the outset, it was not generally considered that possession by the United States of the power to regulate commerce restricted in any way the authority of the States. The nature of the power which had been granted to Congress was very little understood. "Commerce among the States" had hardly come into existence. At the commencement of the Revolution there was but one connected road from North to South, and that a very imperfect one.[2] The only roads which were maintained were those which led from the interior of each State to the principal towns on its navigable waters. Even in 1796, these were the only roads with which the States were much concerned; the care of the "cross-roads," as they were called by one who had been a member of the Constitutional Convention, the States were unwilling to undertake.[3] Foreign trade was the chief commercial interest of the country; but all trade on a large scale, whether foreign or inter-State, was conducted by water, and for this reason the Federal power over commerce was naturally defined in terms of water transportation. Said President Monroe:

"Commerce between independent powers or communities is universally regulated by duties and imposts. It was so regulated by the States before the adoption of this Constitution equally in respect to each other and to foreign powers. The goods and vessels employed in the trade are the only subjects of regulation. It can act on none other. A power, then, to impose such duties and imposts in regard to foreign nations, and to prevent any on the trade between the States, was the only power granted."[4]

In "The Railroads and the Commerce Clause" (p. 19), Mr. Hartshorne says:

"The phrase 'regulate commerce' was a familiar one at the time of the adoption of the Constitution, having been used in no less than twenty-seven Acts of Parliament passed before that time. Those laws

[1] Laws of New Hampshire, 1815, p. 365.
[2] President Monroe's Message of May 4, 1822.
[3] Speech of Abraham Baldwin, February 11th, 1796, Annals of 4th Cong., 1st Sess., p. 314.
[4] Monroe's Message of May 4th, 1822.

consisted mostly of port and harbor regulations, navigation laws, etc., and had relation more to the vessels and other instruments employed in commerce, than to the commerce itself."

This statement is, perhaps, too strong, for the Act of 23 Geo. II., ch. 29, sec. 9, though it did not use the phrase, nevertheless exercised the power by forbidding the manufacture in America of the products of iron. As employed by the States, however, before the adoption of the Constitution, the meaning which Mr. Hartshorne attributes to the phrase is substantially accurate.[1] Edmund Randolph, the first Attorney-General under the Constitution, in the opinion which he rendered to President Washington on the 12th of February, 1791, said:

"The power to regulate commerce amounts to little more than the power to establish the forms of commercial intercourse between the States, and to keep the prohibitions which the Constitution imposes on that intercourse undiminished in their operation; that is, to prevent taxes on imports or exports; preference to one port over another, by any regulation of commerce or revenue; and duties upon the entering or clearing of the vessels of one State in the ports of another."

As thus defined, there was nothing in the Federal power over commerce which would prevent grants by a State of exclusive privileges of inter-State transportation.

On the other hand, it seemed necessary that such monopolies should be established. Inter-State communication was required both for political and for commercial reasons; but the States could not themselves build the roads and run the coaches, and the profit to be derived from the business was not sufficient to induce individuals to incur the risks of competition. The result was, that many grants of exclusive privileges were given by the several States.

An interesting illustration of such legislation is found in the Act of Vermont of October 31st, 1792, "granting to Levi Pease the exclusive privilege of running a stage on the route from Springfield on the post-road to Dartmouth College through this State for the term of twelve years." This statute, which contrasts strangely with present theories of the law, reads as follows:

"Whereas Levi Pease, of Boston, Commonwealth of Massachusetts, has, at great expense and trouble, established a stage from Springfield, in the

[1] See Act of New Hampshire, November 26th, 1778; Law of North Carolina of 1785, Ch. 3; See Laws of 1715-1795, Ch. 234.

Commonwealth of Massachusetts, up Connecticut River as far as Dartmouth College; which stage runs a large distance, in the State of Vermont. And whereas the said Levi represents that the emoluments of the stage, though at present small, may in a few years by proper encouragement, become lucrative to himself, and advantageous to the inhabitants upon Connecticut River and the adjacent country. Therefore, for the due encouragement of so beneficial an undertaking,

"It is hereby enacted by the General Assembly of the State of Vermont, that the said Levi Pease have, and there is hereby given to him, the sole and exclusive right and privilege of running the stage on the aforesaid route through this State, for and during the term of twelve years, on the following conditions, to wit: that the said Levi Pease shall not exact more or greater fare than is usually received on the different routes of the mail stage through Connecticut and Massachusetts. And

"It is further enacted by the authority aforesaid, That if the mail of the United States should be hereafter continued up the River Connecticut, to Newbury, the said Levi shall have the same privilege of extending his line of stage to Newbury aforesaid upon the same conditions as are heretofore mentioned in this Act.

"Provided always, that if the said Levi shall neglect to run the stage, as aforesaid, for the space of two months, at any time within the said term of twelve years, then, and in that case he shall be deprived of all benefit of this Act, anything herein expressed to the contrary notwithstanding."

On November 4th, 1799, the State of Vermont granted to an individual an exclusive right of ferriage from Rowley's Point, Vermont, to Sandy Battery, New York; the rates of ferriage to be fixed by the Selectmen of Shoreham, and the monopoly to last ten years. On October 26th, 1801, Vermont granted to individuals an exclusive right of ferriage from Windmill Point, Vermont, to the opposite shore in New York; the rates of ferriage to be fixed by the Selectmen of Alburgh, and the monopoly to last ten years. On October 27th, 1801, Vermont granted an exclusive right of ferriage to Putnam's Point, New York, the rates to be fixed by the Selectmen of Bridport, and the monopoly to last ten years. In 1795, the State of New Hampshire granted to an individual the exclusive right to maintain a toll-bridge across the Connecticut at Bellows Falls, forbidding the erection of any other bridge for a mile above or a mile below. The bridge so authorized was erected, and the monopoly created over a hundred years ago still exists.

On March 30th, 1797, the State of New York granted to an individual the exclusive right to run stages, etc., between Goshen,

Orange County, and New York City. The natural course of this coach would be through the Ramapo Valley, past Tuxedo, and through a portion of New Jersey. The statute does not specify the route to be followed, but it excludes all competition between the two points named, and therefore covers all routes. On March 30, 1798, the State of New York granted to an individual the exclusive right of transportation between Lansingburg, near Troy, to Hampton, Washington County. The latter point is very near the Vermont State line, west of Rutland. Another statute of the same sort is found in the Act of New York of February 26, 1803, giving for seven years an exclusive right of transportation between Albany and a point to be selected by the grantee on the north boundary line of New Jersey. A similar statute, granting a monopoly to a point on a State line, was passed by Maryland on December 21, 1790, and another by Virginia, Act of December 21st, 1790. Many statutes of the same general character may be found.

The question of the constitutionality of such laws was brought before Congress in 1792, upon a motion to allow the proprietors of stages employed in carrying the mails to carry passengers also. This, it was answered, was not within the power of Congress. Said Mr. Niles:

"The question is simply whether Congress have a right to authorize the carrier of the mail to carry passengers on hire, through those States, where an exclusive right of carrying passengers has been granted by the State government and still exists. You are empowered by the Constitution to establish post-offices and post-roads, and to do whatever may be necessary and proper to carry that power into effect. Now, sir, is it necessary in order to the transportation of your mail that you should erect stage-coaches for the purpose of transporting passengers? What has your mail to do with passengers transported for hire? Why, sir, nothing more than this,—by granting to the carrier of your mail a right to carry passengers for hire, the carriage of the mail may be a little less expensive. Does this consideration render it necessary and proper for you to violate the laws of the States?"[1]

The motion was lost. No suggestion was made that the State laws in any way concerned the Federal power over commerce, or that their validity was open to question on this ground.

In 1824 the case of Gibbons *vs.* Ogden[2] brought the whole subject before the Supreme Court. This great case

[1] Annals 2d Congress (1792), pp. 303-309.
[2] 9 Wheat., 1.

involved the validity of a law of the State of New York giving to Livingston and Fulton, and their assigns, the exclusive right to navigate the waters of that State by steamboats. On the part of the appellant it was contended, that such a law was an attempt by the State to regulate commerce, that this power of regulation had been given to Congress, and that the State had no jurisdiction over the subject. For the respondent it was urged, that the Federal power over commerce, in the absence of Federal legislation, did not exclude State action, and, furthermore, that, if a law passed by a State in the exercise of its acknowledged sovereignty come into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject and each other like equal opposing powers.

Thus, eight years before the ordinance of South Carolina, the doctrine of Nullification was presented to the Supreme Court.[1]

In the opinion of the court the supremacy of Federal authority and the exclusive character of the national power of regulation, were clearly defined.

In reading that momentous decision, apprehending as we do now the interests which were at stake, and with which the conclusion was pregnant, one cannot help pausing to wonder what might have been the result had that decision in any way been different from what it was. Had the utterance of the Court upon the powers of the States been ambiguous; had expression upon the relation of the States to the Federal government been avoided, and the element of nationality, which was involved, less explicitly been disclosed and asserted; had it been allowed to cripple the commercial power of the nation in any way,—where would the influence of that decision have led us now? We may find some suggestion of an answer to this question in the dissensions of the court in New York *vs.* Miln, in the Passenger Cases, the License Cases, and in the statement of Mr. Justice Barbour, that the police power of the State is "complete, unqualified and exclusive."

In the years to come, said Mr. Wayne MacVeagh, it will probably be recognized that among Chief-Justice Marshall's decisions "none will surpass in permanent material advantage that

[1] The same subject had been before the United States Circuit Court in South Carolina a year earlier, and the decision rendered by Mr. Justice Johnson had supported the national authority. Elkisson *vs.* Deliesseline, 2 Wheel., Cr. Cas., 56.

decision which determined that the power to regulate commerce resided exclusively in Congress, and must be kept inviolate from any intrusion by the States, under any guise whatever."[1] Senator Sumner expressed similar views. "If there be any single fruit of our national unity," he said, "if there be any single element of the Union, if there be any single triumph of the Constitution which may be placed above all others, it is the freedom of commerce among the States under which that free trade which is the aspiration of philosophers is assured to all citizens of the Union, as they circulate through our whole broad country, without hindrance from any State."[2]

For reasons which are apparent, however, the decision did not at once have the full weight which has since been given to it. The judgment in Willson *vs.* Blackbird Creek Marsh Company,[3] upholding a local regulation of commerce enacted by the State of Delaware, soon showed that the Federal power could not be, throughout its whole extent, exclusive of all State action. The doctrine was further limited by decisions establishing the validity of State grants of exclusive rights of ferriage over boundary streams;[4] it was not applied to monopolies of transportation by land; and it appears, as late as 1866, to have been considered inapplicable to the monopoly for transportation between New York and Philadelphia which the State of New Jersey had granted to the Camden and Amboy Railroad Company.

State monopolies, therefore, continued; but, owing largely, no doubt, to the changed conditions of transportation, they were no longer created by prohibiting others to exercise the right allowed the grantee, as was done by Vermont in its grant to Levi Pease. Transportation had come to be conducted by corporations, and the State created a monopoly by refusing to give more than one corporation the right to transport between certain places. The whole subject of corporate charters was, it was held, within the jurisdiction of the State. These charters it might grant or withhold at pleasure. The uses to which they might be put were subject to State control alone. States could not be required to grant

[1] Address at Marshall Centennial, reported in 180 U. S., 671.

[2] Speech of Senator Sumner, February 14th, 1865. Cong. Globe, 38th Cong., 2d Session, 793.

[3] 2 Pet., 245.

[4] Conway *vs.* Taylor's Executor, 1 Black, 603; Louisville, etc., Ferry Company *vs.* Kentucky, 188 U. S., 385; State *vs.* Faudre (West Va.) 46 S. E. Rep., 269.

a franchise, nor to divide jurisdiction over the creatures of their own legislation.[1]

When the Erie Canal was built it was the policy of the State of New York to give to the canal a monopoly of transportation of merchandise between East and West. For this reason, when the Utica and Schenectady Railroad was incorporated, it was expressly enacted in the charter of the company that "no property of any description, except the ordinary baggage of passengers, shall be transported or carried on said road."[2] Subsequently,[3] the Utica and Schenectady Railroad and other roads which now form part of the New York Central Railroad were authorized to transport goods, during the suspension of canal navigation, paying the Erie Canal Commissioners the toll which would have been required had the goods been carried on the canal. In 1847, these roads were authorized to transport merchandise during the whole year, but upon payment of tolls as before.[4] The requirement of tolls was not abolished until 1851.[5] It appears from statements made in Congress that these tolls were imposed upon the transportation of grain from the Northwest, and other inter-State freight.[6]

In 1833, the State of New Jersey granted to the Camden and Amboy Railroad Company a monopoly of transportation between New York and Philadelphia.[7] This provision was sustained in the State Courts.[8] In 1861, it was found that this company was unable to meet the demands for transportation of troops and supplies, and a Government quartermaster impressed another railroad and passed over it some eighteen thousand men and four hundred tons of freight. For this, the Camden and Amboy Railroad Company brought suit against the road so impressed, and recovered from it the money received for this service.[9]

[1] See argument of the Court in Railroad Co. *vs.* Md., 21 Wall., 456.
[2] See New York Laws of 1833, Ch. 294, p. 462.
[3] Laws of 1844, Ch. 335, p. 518. 1 Rev. Stats. N. Y., 3d ed., p. 219, Pt. 1, ch. IX., title 2, Sec. 40, 45.
[4] Laws of 1847, c. 270, p. 298.
[5] Laws of 1851, ch. 497.
[6] Remarks of Senator Hale, February 14th, 1865, Cong. Globe, 38th Cong., 2d Sess., 794.
[7] Acts of N. J., 1829-30, 83—Harrison Co., N. J. Laws (1833), 284.
[8] Camden & Amboy Ry. Co., Case 22, N. J. L., 623; Raritan, etc., Railroad Co. *vs.* Delaware, etc., Canal, 18 N. J. Eq., 546.
[9] See Speech of Senator Sumner, February 14th, 1865, Cong. Globe, 38th Cong., 2d Sess., 793; Senator Chandler, May 29th, 1866, Cong. Globe, 39th Cong., 1st Sess., 2,870; Senator Foot, January 15th, 1866, *id.* 227.

Besides the larger interests involved in these exclusive rights, there were also local interests connected with the railroads. "Nearly every railroad in its origin has been independent of all others, and in the early history of such roads they were commonly provided for as local conveniences, with no prevision of the great highways of trade and communication they have since become. It was in many cases thought to be important that a road should be kept as distinct in its business from all others as possible, and at their *termini* in some instances they were not allowed to have the same freight or passenger stations with other roads, lest the local draymen and hackmen should be deprived of a profitable employment."[1]

It was on account of all these impediments in the way of free transportation, but chiefly on account of the military difficulties which arose from the Camden & Amboy monopoly, that Congress, on June 15, 1866, enacted that:

"Every railroad company in the United States, whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, Government supplies, mails, freight, and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination."[2]

Thus the motion which was lost in the Second Congress in 1792 was, in a somewhat different form and with some limitations, renewed and passed seventy-four years later.

In the meanwhile, in 1851 the Supreme Court, in the case of Cooley *vs.* Port Wardens,[3] had reviewed the earlier decisions upon the nature of the Federal power over commerce, and had announced the rule which it is now said "may be considered as expressing the final judgment of the Court."

Mr. Justice Curtis in delivering the opinion in this case—his first constitutional opinion—said:

"The diversities of opinion, which have existed on this subject, have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the

[1] 1st Ann. Rep. Int. Com., Council Bluffs *vs.* Kansas City R. Co., 45 Ia., 348.
[2] U. S. Rev. Stats., Sec. 5,258.
[3] 12 How., 299, 319.

nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now, the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various, subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some . . . . as imperatively demanding that diversity which alone can meet the local necessities of navigation."

The rule was, therefore, established that, in all matters of a general nature, such as admit only of uniform regulation throughout the country, the Federal power is exclusive of all State action. In local matters, the States may legislate until their action is superseded by Congress. Pilotage, quarantine, inspection laws, and all those matters which are of purely domestic concern belong properly under this rule to the States, until their action be superseded by Congress. Matters which concern more than one State, on the other hand, are of national concern, and are within Federal jurisdiction alone.

It probably needs no argument to show that the organization and consolidation of inter-State railways, and the purchase or leasing of other lines of road,—if within the foregoing classification at all,—are matters of more than local interest and concern more States than one. If, therefore, laws on this subject be regulations of commerce, they have long been wholly beyond the competency of the States, and this, not because of any Federal statute, but because of the broad prohibition of the Constitution. The Sherman Anti-Trust law, if it have any application to such cases, is merely a statutory declaration, made in 1890, of a rule which has been recognized at all times since 1851, and whose origin traces back to 1824.

As a matter of fact, however, the great railway system of the country has been built under State law.[1] With comparatively few exceptions, the corporations have been organized by the States. From time to time, they have sold their property, or have purchased or leased the property of other companies, and have consolidated or merged with other railroads. All this has been and must still be done under State law.[1] Plainly, then, the control by a State of its own corporations, whether engaged in inter-State

[1] Louisville, etc., Ry. Co. *vs.* Kentucky, 161, U. S., 677-702.

commerce or not, has never until recently been considered a regulation of commerce. The primary relation of the carrier is to the State in which he operates. Federal control relates directly to but one of his functions, and to the carrier because of that function. What the nature of this control has been is well shown by the character of Federal legislation on the subject. Congress has required the use of safety appliances on railway cars, forbidden transportation of diseased cattle, etc., but has never interfered with State control of State corporations.

In the Northern Securities case a new step is taken, and a form of organization is declared illegal under Federal law because, in the language of the Circuit Court,[1] it amounted to a "virtual consolidation" of competing inter-State railway corporations. Whether the combination was illegal under State law, is beyond the present discussion. The Attorney-General contended that the States could not authorize such a consolidation, and so far as the opinion of the Supreme Court appears to sustain this contention, a new limitation is placed upon the powers of the States.

The foregoing discussion has traced in outline the increasing restriction upon the States. The growing authority of the central Government can also be traced affirmatively in the establishment of new Federal powers. This brings into view the history of the long struggle over internal improvements.

In the early days of the Constitution, there was no suggestion that the United States could, under its power over commerce, establish lines of communication between the States. It was argued that this might be done under the power to establish post-roads, but the view did not prevail, and where roads were built the sanction of the States was required.[2] Thus, on January 10th, 1803, Maryland passed a law "giving Congress power" to appropriate money for the repair of post-roads within the State, "provided that nothing herein contained shall extend, or be construed to extend, to authorize Congress to pass any law for changing the direction of the roads, or any of them, as now established, or to authorize them to pass a law for the opening of a new road." Even with this legislative consent the Federal power was doubted.[3] Without State consent the Federal Government was powerless,

[1] United States *vs.* Northern Securities Co., 120 Fed., 721.
[2] Conf. Searight *vs.* Stokes, 3 How., 151.
[3] See Clay, Speeches, Vol. I., p. 69; Von Holst, Const. Hist., 1750-1815, pp. 389-390; Statesman's Manual I., p. 491.

and sometimes the State would not consent. When Pennsylvania became fearful lest the Susquehanna River should form a highway whereby the products of that State and of New York should float to a market at Baltimore, rather than go to Philadelphia, laws were enacted by the legislature of Pennsylvania forbidding the removal of obstructions to the navigation of the river.[1] For this condition, the Federal Government could offer no relief. "Nobody has contended, and I presume that nobody will contend," said Senator Morrill, of Maine, in 1866, "that the right of eminent domain exists anywhere except in the States. Nobody ever did contend, and I am sure nobody ever will, that a right to land, the title to real estate, ever vested in the Government of the United States. . . . From the earliest period of this government down to the present time, never has the general Government undertaken to enter upon the soil of any State to exercise the right of eminent domain in its own right or to take possession of the soil of the several States, except by the consent of the States."[2] Land could be acquired then only by negotiation, or by eminent domain when this right was granted by a State. Many statutes of this sort were passed. An illustration is found in the Act of North Carolina of 1813,[3] authorizing the United States to obtain sites for lighthouses and fortifications by application to the Governor of the State, who thereupon caused proceedings to be instituted in the State Courts for the condemnation of the needed property.

In 1875, the Federal power of eminent domain was established.[4] "It is true," said the Court, "that this power of the Federal Government has not heretofore been exercised adversely; but the non-user of a power does not disprove its existence,"—a doctrine which Mr. Justice Bradley later extended, so that the power may be exercised within a State even over its protest. "In matters of foreign and inter-State commerce, there are no States."[5]

In the Northern Securities case, the Federal power is once more extended to control, in some respects, the corporate affairs of companies organized under State law to exercise these powers.

[1] Remarks of Senator James A. Bayard, of Delaware, February, 1807; Annals 9th Cong., 2d Session, 56.
[2] Cong. Globe, May 28th, 1866, 39th Cong., 1st Sess., p. 2,853.
[3] Laws of 1796-1820, chap. 857.
[4] Kohl *vs.* United States, 91 U. S., 367.
[5] Stockton *vs.* Baltimore & N. Y. R. R. Co., 32 Fed., 9.

The grant of power to Congress to regulate commerce was given in broad terms, and was undefined. Monroe said that the creation of this power involved "a radical change in the whole system of our government,"[1] but there was no suggestion as to the specific nature of the change; while, on the other hand, as has been seen, the States continued to legislate as if no change had been made. The Federal authority as it exists to-day is the work of the national judiciary, and the decisions of the Supreme Court which mark its extent and its limitations are the enduring monument of the greatness of the men who have occupied that bench. "No instrument," said Judge Cooley, "can be the same in meaning to-day and forever and in all men's minds;" but the court, in the construction of the commerce clause, has persistently adhered to the original purpose of the framers of the Constitution under circumstances wholly unforeseen. Decisions like the recent one in the Securities case mark, in some respects, a change of law; but with greater truth they may be said to show how much more intimate are the commercial relations of these States than they were even thirty years ago.

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[1] Bancroft, History of U. S., Vol. 6, p. 143.